IN the Matter of the Human Rights Code, 1981, S.O. 1981, c.53, as amended

AND in the Matter of the Amended Complaint by Anita Hall (Trottier) against A-1 Collision and Auto Service and Mohammed Latif dated July 24, 1990

INTERIM DECISION
(Public Policy)

Before a Board of Inquiry comprised of
Professor T. Brettel Dawson

Appearances:

Human Rights Commission: Ms. Cathryn Pike -- Counsel ✓

Respondent (Mohammed Latif): Mr. Russell Juriansz -- Counsel
Ms. S. Margot Blight -- Counsel
Mr. Paul Schabas -- Counsel

DELIVERY TEXT OF REASONS FOR DECISION
ON A PRELIMINARY MOTION BROUGHT BY THE RESPONDENT
THAT THE BOARD OF INQUIRY STEP ASIDE

INTRODUCTION

The individual Respondent, Mr. Mohammed Latif, has brought a preliminary motion requesting that I step aside as the Board of Inquiry with respect to this complaint because of the disclosure to me of the substance of settlement negotiations between him and the Human Rights Commission (the Commission). I should note that the corporate Respondent is no longer in existence having been dissolved on 05 March, 1990, for default in complying with the Corporations Tax Act. It is taking no part in these proceedings. References to the Respondent in these reasons, then, refer to the individual Respondent only.

It is not disputed that detailed settlement information was put before me by the Commission, albeit in documents prepared in the context of a judicial review application made by the Respondent to the Divisional Court. Nor is it disputed that I have in fact read this information. What is in issue is whether my knowledge of the settlement discussions renders it inappropriate for me to continue to act as a Board of Inquiry with respect to the merits and accordingly, whether I should step aside from so doing. This

motion, and indeed the disclosure of the settlement information, arises out of a complex factual background which has arisen to this stage of the complaint. For clarity and convenience, I will briefly outline this factual background.

FACTUAL BACKGROUND

In 1985, the Complainant was employed by the corporate Respondent, A-1 Collision. She alleges in her complaint, originally filed on July 16, 1985 and amended on July 24, 1990, that during her employment, the individual Respondent, Mr. Mohammed Latif, subjected her to harassment because of her sex, to sexual solicitation and to reprisal for the rejection of that sexual solicitation (Exhibit #2). On April 26, 1991, I was appointed by the Minister of Citizenship to act as a Board of Inquiry with respect to this complaint (Exhibit #1). When the hearing initially commenced by way of conference call, counsel for the individual Respondent raised an objection to my jurisdiction to act as a Board of Inquiry because of the lengthy delay between the filing of the initial complaint and the recommendation by the Human Rights Commission to the Minister that a Board of Inquiry be appointed.

It was agreed that this objection to jurisdiction because of delay would be argued at the outset of the hearing as a preliminary motion. Prior to the hearing, however, the Respondent communicated his intention to abandon this motion before me and to proceed directly to the Ontario High Court on the matter. By consent, the hearing dates before me were adjourned and the Respondent's

application for judicial review with respect to delay was transferred to the Ontario Divisional Court. The Ontario Attorney General intervened as of right in the Divisional Court proceedings. Because relief in the form of prohibition was sought, the Commission considered it proper, and the Respondent agreed to add both the Complainant and the Board of Inquiry as parties to these proceedings.

The Respondent argued that the Commission had lost jurisdiction in this complaint because of its delay and because of its failure in the initial investigation to endeavour to effect a settlement (Respondent's Factum, Preliminary Exhibit #1, at para. 18). As well as offering constitutional argument on the motion, the Attorney General requested that the Respondent's motion be quashed as premature. The Divisional Court ultimately decided that the motion was premature and directed the matter back to me as the Board of Inquiry in the first instance.

A further conference call was held for the purpose of setting dates for the hearing of preliminary matters and the merits. Counsel for the Respondent indicated his intention to bring the delay motion before me. A preliminary indication was also given that a motion requesting me to step aside might be brought. Contemporaniously, the Respondent sought the leave of the Ontario Court of Appeal to appeal from the determination of the Divisional Court. Leave was not granted and after some adjustment of counsel and dates, the hearing before me began on July 03, 1992.

In the course of the proceedings before the Divisional Court

and the leave application to the Court of Appeal, the Respondent and the Commission each prepared written arguments and assembled application records in support. A range of documentary material, including copies of the original and amended complaints, various versions of the Commission's case summary with respect to the complaint and correspondence, were part of these application records. A number of affidavits were also included and at least two of these affidavits were the subject of cross-examination in preparation for the substantive argument of the motion before the Divisional Court. The Commission served me with copies of its application records and factums. I also received copies of the Respondent's factums.

Counsel agree that, as a general principle and professional courtesy, the transmission of this kind of material to me, and my perusal of it, was appropriate.

At the commencement of the hearing in person before me on July 03, 1992, the Respondent argued his motion on delay. The Respondent's application record in the Ontario Court of Appeal was filed with me as Exhibit #3, together with transcripts of cross-examination on the affidavits of Mr. Fitzmaurice, who had represented Mr. Latif in his later dealings with the Commission (Exhibit #4), and Mr. Speranzini, a Human Rights Officer working with the Commission's legal unit (Exhibit #5). These affidavits were included in the Court of Appeal application record and had been present in the parties' Divisional Court application records. Ms. Blight, as counsel appearing for the Respondent, stated that no

objection was taken to me hearing this motion and considering the material placed before me in support of it.

Ms. Pike, as counsel for the Commission, expressed some reservation with respect to the inclusion of the affidavit of Mr. Speranzini and the transcript of his cross-examination on it. Her concern was based on the Respondent's alternative motion that the disclosure of this particular material to me constituted grounds for me to step aside should the complaint not be stayed for delay. This reservation was withdrawn when I indicated that I had read the Commission's application record, including Mr. Speranzini's affidavit and, as such, new material was not being put before me.

By letter dated July 16, 1992, I communicated to the parties my decision that the complaint should not be stayed for delay and I dismissed the Respondent's motion on delay. I indicated that my written reasons for this decision would follow in August.

When the hearing continued on July 28, 1992, Mr. Juriansz, as counsel for the Respondent, brought a motion that I should step aside as a matter of public policy because of the disclosure of settlement information to me in Mr. Speranzini's affidavit.

Unlike the motion respecting delay, which if successful would have resulted in a stay of the complaint, should I step aside as being unable to continue to exercise my powers as a Board of Inquiry, the Commission may request that the Minister appoint a new Board of Inquiry (Human Rights Code, R.S.O. 1990, c. H.19, section 41(3); the Code). I should point out that I refrain from detailing the nature of the settlement disclosure contained in Mr.

Speranzini's affidavit and pursued in cross-examination on it to avoid causing any future problems. Suffice it to say that signficantly more was related than simply that the statutorily mandated efforts at settlement (Code, section 33(1)) were undertaken.

Analysis

Public Policy:

The Respondent argues that the disclosure of the substance of the settlement discussions offends against an over-riding public policy of ensuring the confidentiality of settlement discussions in order to promote settlement. Mr. Juriansz pointed out that settlement negotiations are generally subject to privilege and are not compellable or admissible evidence at a hearing. This public policy is said to rest on the importance of encouraging the settlement process and avoiding litigation. An illustration of the strength of this policy in civil litigation was given by reference to Rule 49.06(2) of the Ontario Rules of Civil Procedure which provides:

> where an offer to settle is not accepted, no communication respecting the offer shall be made to the court at the hearing of the proceeding until all questions of liability and the relief to be granted, other than costs, have been determined.

Mr. Juriansz argued that the possibility of disclosing unsuccessful settlement negotiations to the decisionmaker would have a chilling effect on the willingness of respondents to participate in the settlement process required in the Code. He argued that any offer to settle can be seen to implicitly involve some admission, and

even where liability is explicitly denied, a public perception of wrong-doing may arise. In his submission, the public policy to foster settlement is a matter of general principle which should not be subject to determination in individual cases.

In reply, the Commission argued that the public policy interest in encouraging settlement is not identical in civil and human rights proceedings. I understood the Commission's argument to be that, in civil law, it was necessary to create incentives and protections to encourage parties to enter into settlement negotiation. However, in the human rights context, where there is a statutory obligation to pursue settlement, the same system of protections and incentives to ensure settlement is considered, is not required. The parties will "come to the settlement table" in any case. The Commission, of course, accepted that under the Code, it has a duty to endeavour to effect settlement.

I do not agree with the Commission in seeking to distinguish civil and human rights litigation in this way. While it is true that there is a statutory obligation to seek settlement in section 33(1) of the Code, I do not take this to weaken the protection given to settlement negotiations. The inclusion of a statutory obligation emphasizes the importance placed upon conciliation and settlement and the avoidance of litigation in the human rights context. The Commission has a public interest function to promote human rights in Ontario and is to act in a non-partisan manner during the investigation and settlement process. Moreover, the conciliation and settlement efforts of the Commission, arguably,

are as much part of the Commission's function to promote and understanding and acceptance of and compliance with the Code, as they are to avoid litigation (see Code, section 29). I think it is also axiomatic that the success of settlement negotiations depends on the quality of participation by the parties to them. As the possibility of an adversarial proceeding before a Board of Inquiry always exists should settlement fail, participants would be most reserved if anything they propose or admit during settlement discussions could be introduced in the Board of Inquiry proceedings.

The principle of exclusion of settlement discussions has been long established in Canada. In York County v. Toronto Gravel Road and Concrete Co. (1882), 3 O.R. 584, affd. (1885), 12 S.C.R. 517, Proudfoot J. said:

> The rule I understand to be that overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice, are excluded on grounds of public policy.

And, in William Allan Real Estate Co. v. Robichaud (1986), 17 C.P.C. (2d) 138, Campbell J. held that the privilege arises if the communication is made for the sake of buying peace or to effect a compromise, without more: "what sensible [person] would attempt settlement if it could be used against [them]" (at p. 141).

In the human rights context, obiter statements made by an Ontario Board of Inquiry in Dudnik v. York Condominium Corporation No. 216 (1990), 12 C.H.R.R. D/325, at para 69 are to a similar effect. The Board stated:

The objective of conciliation and settlement of the Code would

> be compromised if discussions and knowledge gained in that process could be divulged at a subsequent hearing. It is in the public interest that discussions as to conciliation and settlement take place and the Code requires the Commission's officers to "endeavour to effect a settlement"...This possibility is maximized if the discussions in the conciliation and possible settlement stage are without prejudice...

Accordingly I accept the general principle that settlement negotiations should not be disclosed when a matter proceeds to a hearing applies in human rights proceedings.

Of course, exceptions to it exist, for example where there is fraud or coercion (See Dudnik, at para 70; J. Sopinka et al., The Law of Evidence in Canada (Toronto: Butterworths, 1992). The prohibition on the decisionmaker becoming aware of the content of settlement discussions may also be waived. It also seems clear that in some circumstances consideration of the information by the decisionmaker may be necessary. In any of these situations, I would accept the propriety of settlement negotionations being before me.

Evidence in the Hearing:

The Commission made a second argument, which if accepted would take this situation outside of the scope or application of the evidentiary or public policy concerns. Ms. Pike argued that no evidence arising from the settlement negotiations would be in issue in the hearing. Nor would any attempt be made to base Mr. Latif's liability under the Code, if any, from express or implied admissions which may have arisen in the settlement negotiations. I note that in Field v. Commissioner for Railways for New South Wales (1957), 99 C.L.R. 285, the Australian High Court commented that the

form of privilege by which settlment negotiations are excluded, is directed against the admission in evidence of express or implied admissions.

In Ms. Pike's submission not only was this information not sought to be admitted in evidence, but no harm or prejudice would result to the Respondent from it having become known to me in another manner. She pointed out that the information was made available only to resist a preliminary objection as to jurisdiction. It was made.available in separate proceedings -- i.e. the judicial review proceedings. The Commission suggested that I could "bracket" or disregard the information with respect to settlement and that it should have no impact on my determination of any issue of liability or remedy.

An analogy was made to a voir dire, or other situations where a decisionmaker must make a determination of admissibility when a claim of privilege is made. In these contexts, a decisionmaker will often be required to consider the disputed evidentiary material and, if he or she decides that it is indeed irrelevant or inadmissible, must subsequently put it out of his or her mind. Re Daintrey, Ex parte Holt, [1893] 2 Q.B. 116 is authority, if one is needed, for the proposition that a decisionmaker may look at a document and its contents for the purpose of deciding the question of its admissibility.

Another similiar situation arises where the existence of an agreed settlement is in issue. In Guthro v. Westinghouse Canada Inc., Ontario Board of Inquiry (M.R. Gorsky), August 21, 1990,

Decision 416A, the Respondent moved that the Board of Inquiry find that a settlement binding on the Commission, the Complainant and the Respondent had been concluded. Extensive evidence about the alleged settlement was introduced and discussed in the decision. In the result, the Board held that no binding settlement had been concluded. Subsequently, he went on to determine the complaint on its merits without any objection arising from his having considered settlement information. Likewise in Gritton v. T.C.C. Beverages Ltd, Ontario Board of Inquiry (M.R. Gorsky), August 14, 1989, the existence of a concluded settlement was first considered by the Board of Inquiry with detailed reference to the purported terms of settlement. Again, a finding was made that no binding settlement had been entered into and that the hearing should proceed on the merits.

The Respondent sought to distinguish Guthro and Gritton on the basis that the issue in those cases was the existence or not of a settlement and discussion of the settlement was necessary to the proceeding. The content of the alleged settlement was brought before the Boards by the Respondents. The information was not brought forward without consent. And, no objection was taken in either case to its disclosure -- that is, no claim of privilege (or its breach) was raised.

Mr. Juriansz recognized that other documents placed before me, arising from the delay motion, contain extensive and potentially prejudicial background information on the investigation of the complaint. This is an inevitable consequence of Boards being asked

to enquire into preliminary controversies such as delay (See Sinclair v. Peel Non-Profit Housing Corp., 11 C.H.R.R. 341). Such material, while leaving the decision-maker less than entirely "fresh" with respect to the evidence in the complaint, is nevertheless properly before a Board. It is also information which the Board of Inquiry should disregard when proceeding to the hearing of evidence and the determination of liability on the basis of that evidence.

However, Mr. Juriansz urged that the settlement negotiations were of a different character and were protected by public policy which severely restricts their disclosure. In his view, there must be a good and sufficient reason for this kind of material to be released to a decisionmaker.

I must say I have considerable sympathy for the Commission's argument that the settlement material related only to preliminary matters in the Divisional Court and would not be in issue before me at the hearing of the merits. It was not being introduced to establish express or implied admissions. There is no question of the Commission asserting that, because Mr. Latif had participated in settlement negotiations, he may be taken to have admitted that the Complaint against him has merit. And it is true that the material was not made available to me in the course of evidence before me. No real objection has been made that my ability to decide the merits fairly has been compromised or that an apprehension of bias on my part has arisen as a result of me seeing this material.

The issue comes down, as Mr. Juriansz urges, to the strength and scope of the public policy issue at stake. The fact remains that this information was made available to me. It was made available to me as a party to the judicial review proceedings but also, indivisibly, in my capacity as the Board of Inquiry. Moreover, the judicial review proceedings, while separate proceedings, arose from the complaint which I have been charged by the Minister to hear and those proceedings were part of the process of adjudicative resolution of the complaint.

In Gohm v. Domtar Inc., Ontario Board of Inquiry (H. A. Hubbard), January 20, 1988, Document 331, an issue arose as to whether a Board of Inquiry should withdraw. The Board held an appointment in respect of another complaint against the same respondent, albeit in different employment in a separate location. That "first" complaint was in the process of being settled and one of the conditions of the settlement was that its terms not be disclosed to the Board of Inquiry in Ms. Gohm's complaints.

The Board of Inquiry noted that the apprehension had been raised in the minds of counsel negotiating the settlement, that anyone who had been privy to the terms of settlement of the "first" complaint might be biased thereby in considering Ms. Gohm's complaint; hence the condition of non-disclosure. The Board of Inquiry also noted that in the process of approving of the proposed settlement, he would have to consider the its terms. Thus, as the Board of Inquiry was the same person in each case, he was faced with a dilemma.

As he had not seen the terms of the settlement at the time of writing, he could not assess whether there would be a reasonable apprehension of bias. Yet, because he considered it incumbent upon him to avoid jeopardizing the settlement of the "first" complaint, he exercised his discretion under section 41(5) [then section 40(5)] of the Code to declare himself unable to continue to act as a Board of Inquiry.

Now, it is clear that Professor Hubbard was concerned with the possibility that a reasonable apprehension of bias might arise in that case, and he was concerned to avoid prejudicing the settlement of a complaint. As such, the case has no direct relevance. But, what I notice about it and why I refer to it, is that Professor Hubbard chose to withdraw even though he had not yet seen the terms of settlement, even though those terms of settlement related to a separate complaint, and even though he could not assess whether the terms of settlement would have any possible prejudicial effect in the complaints made by Ms. Gohm. Moreover, the terms of settlement in the "first" complaint would clearly not have been in issue or in evidence in the Gohm complaints.

Professor Hubbard's approach was entirely sensible given its context, but it also indicates caution with respect to the issue of knowledge of settlement discussions by Boards of Inquiry and great respect for the public policy of encouraging settlement where possible. I also note that in the recently published second edition of her book, Human Rights in Ontario (Toronto: Carswell, 1992), Judith Keene goes so far as to remark:

> When the parties are convened at a conciliation meeting, they are advised that conciliation is commencing and that everything they say at this stage is privileged. No evidence discovered in the course of conciliation is ever led before a Board (at p. 260).

Accordingly, I believe it would be unwise for me to rely too heavily on a distinction between my coming to know about the content of settlement discussions as "evidence" in the substantive hearing for the purpose of establishing "admissions" to the prejudice of the Respondent, and my coming to know about the content of settlement negotiations in other ways and in the preliminary stages of the proceedings in which I am involved. I believe it is more sound to accept the general principle that disclosure of settlement negotiations at any stage of the proceedings (in the absence of fraud or coercion) should occur only where there is waiver of privilege (consent), where admissibility is in issue, where the existence of a settlement is directly in issue, or disclosure is otherwise necessary.

While I am confident that I could bracket the settlement information (which is in any case quite ambiguous), I do not believe that I should do so independently of the context in which that information was made available to me. That is, I believe I should do so only if there was a good and unavoidable reason for me to have seen the settlement information.

Thus, I must go on to consider the Respondents argument and the Commission's denial, that the disclosure of the information to me was unilateral and unnecessary and is grounds for me to step aside.

Unilateral and Unnecessary Disclosure:

The Respondent argued that the communication of the settlement discussions to me was unnecessary. He emphasized that the privilege from disclosure rested in Mr. Latif, who did not consent to its release nor impliedly waive his privilege. Rather, Mr. Juriansz suggests that the Commission took away this privilege by "blurting out" settlement details without consultation, consent, or justification.

The Commission argued in reply, that disclosure of the settlement information was made necessary by arguments raised by the Respondent in his Divisional Court application. Having thus himself put settlement negotiations in issue, it should not lie in the mouth of the Respondent to complain that details were disclosed.

In the Divisional Court, the Respondent argued that the Commission had lost jurisdiction because of a failure to pursue settlement. Certainly, the first version of the case summary indicated that "for practical reasons it was not felt to be worth the effort which it would entail to try to engage the respondent in settlement discussions." Had this been the final case summary, it could be speculated that such a statement would invite the argument that jurisdiction had been lost. Of course, the investigation had not then been completed and subsequent efforts at settlement rectified the potential problem without loss of jurisdiction.

Ms. Pike argued, however, that because the Respondent made the

argument, it was necessary for the Commission to detail the efforts it made toward settlement and so lay an evidentiary basis to satisfy the Divisional Court that the Commission was not in breach of its statutory obligations. She argued that a terse statement asserting that settlement negotiations had taken place would have likely have been insufficient to lay this evidentiary basis. I certainly agree that some response to the Respondent's argument was required.

Mr. Juriansz emphasized that his objection to the disclosure of the substance of the negotiations was not limited only details of proposals but the fact that proposals might have been made, entertained, or responded to -- in short, to the whole course of interaction and disposition in the negotiations. He argued that the detail provided was not necessary to establish that the Commission had fulfilled its statutory obligation. In his view, it would have been sufficient to have indicated that discussions took place.

I tend to agree with Mr. Juriansz on this point. What was in issue was the fact of whether settlement discussions had taken place and not their substance. It would have been possible for dates of meetings or correspondence relating to settlement to have been given together with the rider that the details of what transpired were subject to privilege. It would then have been open to the Respondent to dispute the fact of settlement negotiations having taken place or having been attempted. To the extent that the Commission may have been trying to show Mr. Latif's position

with respect to the delay in the investigation, this too could have been done, albeit carefully, without detailing the course of negotiations.

Ms. Pike expressed concern that if I decide to step aside in this situation, it would open a door to Respondent's wishing to unmeritoriously "get rid" of Boards of Inquiry. She suggested that all Respondents would need to do would be to bring a judicial review application claiming default in efforts to settle a complaint, to which the Commission would be required to respond with details of the settlement process undertaken. The associated result would be disqualification of the decisionmaker.

I believe this concern could be addressed in two ways. First, only rarely will it appear on the face of a case summary that efforts at settlement were not made. Only rarely should the issue arise in even a threshold manner. Secondly, I believe the response by the Commission to such an argument can be restricted to the fact of efforts to settle and need not include their content. The actual details might bolster the Commission's argument by indicating how creative and strenuous the efforts were -- but, I do not think this would be required to satisfy the Code requirements.

CONCLUSION AND DISPOSITION

Having considered the arguments put before me, I have reached the conclusion that I must exercise my discretion to step aside. The disclosure of the substance of the settlement negotiations to

me has rendered me unable to continue to act with respect to the hearing of the merits in this case. To do so would be contrary to public policy and would indeed deprive the Respondent of his right, which he has not waived, to a decisionmaker who does not know the content of settlement negotiations.

I make this decision with great reluctance. But I have concluded that the release of the information to me was both unilateral and unnecessary. I hope that the Commission will speedily exercise its discretion to request the Minister of Citizenship to appoint a new Board of Inquiry. I will write to the Minister informing her of my decision to withdraw and outlining the reasons for so doing. I should add that I believe that all references to the content of settlement negotiations should be removed from documents before the Board. Special consideration should be given to availability of the transcript of oral argument on this motion.

In closing, I would like to emphasize that I believe that the Commission acted in a way that it considered legally necessary. In my decision I take a more cautious and restricted view than that taken by the Commission. I intend no criticism of the Commission, but I do hope that this situation need not arise in the future.

B Dawson

31 July '92

COPY

T. Brettel Dawson
Associate Professor

2834 Haughton St.
Ottawa, Ont. K2B 6Z3

July 31, 1992

Hon. Ms. Elaine Ziemba
Minister of Citizenship
5th Floor, 77 Bloor St. W.
Toronto, Ontario M7A 2R9

BY FAX AND MAIL

Dear Minister:

On April 26, 1991, you appointed me to act as a Board of Inquiry in the matter of an amended complaint made under the Human Rights Code, 1981, S.O. 1981, c.53, by Anita Hall (Trottier) against A-1 Collision and Auto Service and Mohammed Latif dated July 24, 1990.

This matter has been the subject of extensive preliminary proceedings. In addition, the Respondent brought a motion that I should step aside with respect to this complaint because of the disclosure to me of the substance of settlement negotiations between him and the Human Rights Commission.

Having considered the arguments put before me, I have reached the conclusion that I must exercise my discretion, implicit in section 41(5) of the Code, to step aside where I am unable to continue to act as the Board of Inquiry. My inability stems from my conclusion that continuing to act would be contrary to the public policy of protecting settlement negotiations from disclosure, and would deprive the Respondent of his right to a decisionmaker who does not know the content of settlement negotiations. I attach a copy of the delivery text of my reasons for decision.

I reach this decision with great reluctance and I have expressed the hope to counsel, that the Commission will speedily exercise its discretion to request you to appoint a new Board of Inquiry. Counsel have reserved dates on September 9, 10, 11 and 23, 1992 on which they could be available to continue the hearing before a new Board of Inquiry. These dates are obviously subject to confirmation, but I mention them to you in order to give you a time frame in which I would hope a new Board of Inquiry could be appointed at the request of the Commission.

In closing, I would like to emphasize that I believe that the Commission acted in a way that it considered legally necessary in divulging the settlement information. While I disagree in law, I intend no criticism of the Commission.

Yours truly,

T. Brettel Dawson
Board of Inquiry